OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

Vol. 46, No.1 January 2016

I. **SUBJECT:** THE ROSARIO RULE—DUTY TO PRESERVE AND DISCLOSE POLICE OFFICER'S NOTES

II. **QUESTION:** Are police officers required to preserve and disclose to prosecutors all notes, including emails, text messages, voicemails, photos, videos, and other information generated by any other application on Department issued smartphones and tablets?

III. **ANSWER:** Yes. In addition to preserving and disclosing all handwritten notes, police officers must also preserve and disclose electronically stored information including all emails, text messages, voicemails, photos, videos, and other information generated by any other application on Department issued smartphones and tablets.[1] Failure to do so will likely result in the reversal of a criminal conviction.

IV. DISCUSSION

A. Introduction

People v. Rosario, is the landmark New York Court of Appeals case that created an obligation on police officers to preserve for trial, and prosecutors to ultimately make available to the defense, all statements about a crime that relate to a witness's testimony.[2] These preservation and disclosure obligations are now codified in Criminal Procedure Law section 240.45.

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[1] Though non-Department issued devices should not be used for official business, any information contained on personal devices should also be preserved and disclosed in the event such smartphones and tablets are used.
[2] 9 N.Y.2d 286 (1961).

The Department has recently issued smartphones to uniformed members of the service and installed tablets in Department vehicles. In light of this advancement, this bulletin is being issued to remind all Members of the Service of their obligation to preserve emails, text messages, voicemails, photos, videos, and other information generated by any other application on these devices.

B. Police Officers Must Preserve Their Notes

a. People v. Cardona[3]

In *People v. Cardona*, a witness had given the investigating officer a description of the perpetrators. The investigating officer recorded the description in his notebook, but he did not transcribe the information to an official report. The defendant was arrested and subsequently convicted of murder and assault.

After trial, the defendant's attorney became aware of the contents of the notebook and that the description recorded in the notebook was inconsistent with the defendant's actual appearance. During a hearing held as a result of defendant's second motion to vacate his judgment of conviction, defense counsel testified that the prosecution had never disclosed the notebook, and that if he had been aware of the statement in the notebook, he would have used it for impeachment purposes.

The court ultimately found that the statement in the investigating officer's notebook was *Rosario* material because it was provided by the prosecution's key witness to the investigating officer and was signed by the witness. Because the *Rosario* material had not been disclosed, the court vacated the judgment convicting the defendant of murder and assault and ordered a new trial.

b. People v. Mack[4]

After purchasing cocaine from defendant, an undercover officer returned to his car and radioed a description of the seller to his back-up team. The operation supervisor wrote the description of the seller on a piece of paper. The supervisor subsequently destroyed or discarded her notes without transferring the information to an official report. She later testified at trial that she directed the back-up team to arrest the defendant based on the description given by the undercover officer. The undercover officer testified that he saw the defendant in the arresting officer's custody before he completed his own report regarding the sale. Based on the evidence presented at trial, the defendant was subsequently convicted of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

The Appellate Division found that the supervisor's notes were *Rosario* material. Her notes related to her testimony because they contained a description of the suspect. Moreover, she testified that the defendant was apprehended based on the description in her notes. The Court explained that the supervisor's notes might have helped the defendant's attorney on identification

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[3] 138 A.D.2d 617 (2d Dep't 1988).
[4] 180 A.D.2d 824 (2d Dep't 1992).

issues during cross examination. Further, the defendant was prejudiced because there was no way to determine that the information in the undercover officer's reports matched the description in the supervisor's notes. This was important because the undercover officer's report was prepared after he saw the defendant in custody. The Court ordered a new trial based on the government's failure to preserve *Rosario* material.

c. United States v. Vaughn[5]

In *United States v. Vaughn,* the New Jersey State Police and federal authorities used a cooperating witness to investigate a group of defendants. The defendants were arrested and charged with conspiracy to sell heroin and prescription drugs. During the investigation, the cooperating witness conducted controlled drug buys, and used text messaging to communicate with police and the FBI. When the case reached discovery, though, the government was unable to produce all of the electronic communications between one of the officers and the witness.

The court ultimately found that there was a duty to preserve all text messages in an investigation, not just those between law enforcement and defendants. Especially since the FBI had a policy in place for preservation, the government failed to use due diligence in preserving *Rosario* material. Though *Vaughn* is not a New York case, it embodies the *Rosario* principles and demonstrates how courts are adjusting to new technology with regard to *Rosario* material.

C. What this Means to the NYPD

Rosario and Criminal Procedure Law section 240.45 require the prosecutor in a criminal case to disclose to the defendant, any written or recorded statement made by a person whom the prosecutor intends to call as a witness at trial, and which relates to the subject matter of the witness's testimony. Therefore, officers must always secure all items which may contain a witness's statement and inform the prosecutor, as soon as possible, that such material is available. Failure to do so may result in the reversal of a criminal conviction.

Rosario material is not only limited to handwritten notes in notebooks or on scraps of paper, as were the concern in *Cardona* and *Mack.* As seen in *Vaughn*, any electronic records or correspondence is considered *Rosario* material and must be preserved and disclosed as such.

New York courts have identified the following as *Rosario* material:

1) Memo books;
2) Personal notes and preliminary worksheets prepared by an investigating officer;
3) All notes made by a police officer who witnesses a crime, if they are made in connection with the defendant's arrest;
4) Arrest reports, interview reports, complaint reports, and incident reports; and
5) Electronically recorded communications.

It does not matter how the aforementioned categories of materials are recorded. Regardless of whether they are handwritten and kept in a paper file or typed and electronically stored, if they contain a witness statement, they **must** be turned over to the prosecutor. The prosecutor will then

[5] No.: 14-23, 2015 U.S. Dist. LEXIS 152530 (D.N.J. 2015).

determine when the material will be turned over to the defendant's attorney and what will be included.

There is an exemption on certain materials that the court would consider sensitive or confidential, such that it should be withheld from the defendant's attorney. However, such exemptions are rarely utilized by the courts. Any material which a police officer considers to be confidential should be discussed with the district attorney at the start of the case, so that it may be withheld with the court's approval. If an officer is unsure of whether material is *Rosario* material or confidential, he or she should discuss the matter with the prosecutor so that the prosecutor can make a proper determination.

Regardless of confidentiality concerns, all emails, text messages, voicemails, photo, videos, and other information generated by any other application on Department smartphones and tablets must be retained on the device. In the event that usage approaches or exceeds the memory of a Department smartphone or tablet, **photos** and **videos** must be transmitted to the applicable command email address listed in Operations Order 20 of 2015. Those photos and videos may then be removed from the device once it is confirmed that the data has been properly moved and stored. All emails, text messages, voicemails, and other information generated by any other application on Department smartphones and tablets, however, must not be deleted from the device. Deletion of electronically stored information is the equivalent of the failure to preserve the notes at issue in *Cardona* and *Mack* and the text messages in *Vaughn*.

D. Conclusion

Members of the service must be mindful of their obligation to preserve and disclose their written notes as well as all emails, text messages, voicemails, photos, videos, and other information generated by any other application on Department smartphones and tablets. Refer to Operations Order 20 of 2015 for official Department procedure for using Department smartphones and tablets.

Any questions concerning the above-discussed preservation and disclosure obligations should be directed to the Legal Bureau at (646) 610-5400.

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Legal Bureau Bulletin Volume 21, No. 5 is revoked